No. 77-1751

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIAM LACEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1a-2a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1978. A petition for rehearing was denied on May 9, 1978 (Pet. App. 3a), and the petition for a writ of certiorari was filed on June 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the giving of a second, supplemental *Allen*-type jury instruction constituted reversible error.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 812, 841 (a) and 841(b)(1)(A). He was sentenced to imprisonment for two and one-half years, to be followed by a special parole term of three years. The court of appeals affirmed (Pet. App. 1a-2a).

1. The evidence showed that, by threat and coercion, petitioner and an accomplice exacted six ounces of cocaine from three persons who had smuggled the drug into the United States (Tr. 18-20, 158-163). Two eyewitnesses independently and positively identified petitioner as one of the men who had taken the cocaine (Tr. 33-34, 171-173). Moreover, a police officer testified that he had observed petitioner and his accomplice in New York City, after they had taken the cocaine (Tr. 340-341),[1] and this same

[1] A mid-trial hearing (out of the presence of the jury) revealed that on February 19, 1976 this police officer participated in the arrest of petitioner, his accomplice, and petitioner's wife. The arrest occurred after an automobile driven by petitioner had side-swiped another parked car, with two occupants, in lower Manhattan (Tr. 227-228). In the ensuing chase, the officer saw petitioner's accomplice toss two guns

officer made both an in-court identification of petitioner and identified as pictures of petitioner and his accomplice the two photographs in the photospread which the two eyewitnesses had selected (Tr. 340, 341-342).

2. Approximately two hours after it had begun deliberations the jury reported that it was "hopelessly deadlocked" (Tr. 425). Petitioner immediately moved for a mistrial. The trial judge, however, determined that the brevity of the deliberations and the probability of a third trial[2]—entailing additional time and expense—made a different course of action appropriate (Tr. 425-426). First advising counsel of his intentions and reasoning (Tr. 428), the court gave the jury a modified *Allen* charge (Tr. 429-432), excused them for the evening and suspended deliberations until the next day. The following day, after about three and one-half hours of additional deliberation, the jury reported that it was still unable to reach a verdict (Tr. 441). Petitioner again sought a mistrial, but the judge decided that the deliberations still had not taken an excessive length of time and that a restatement of the *Allen* instructions given

out of the automobile (Tr. 228-229, 231). The district court sustained petitioner's objection to the government's offer of the guns and severely limited the officer's testimony so as to insure that the jury did not learn of the events leading to the officer's observation of petitioner in the company of his accomplice (Tr. 241-247, 338-342).

[2] The second trial had terminated by the granting of petitioner's motion for a mistrial on the ground that prejudicial testimony had been introduced into evidence.

the previous day was in order (Tr. 443-446). With the exception of a note requesting additional information, nothing further was heard from the jury on that afternoon, and at 5:10 p.m. the district court excused the jurors for the day—with the instruction that they return for further deliberations the following morning (Tr. 451). At 10 a.m. the next day the jury resumed its deliberations, and, at approximately 11:50 that morning announced its guilty verdict (Tr. 453).

ARGUMENT

1. Petitioner contends that the second *Allen*-type jury instruction in this case was impermissively coercive, was in direct conflict with the rule of the Ninth Circuit, and requires review by this Court (Pet. 9). In our submission, the second *Allen*-type jury instruction was not impermissively coercive. Adequate safeguards were provided, including an instruction regarding the duty of a dissenting juror to keep his or her conscience and not simply acquiesce to the wishes of the other jurors (Tr. 430, 445). *United States* v. *Hynes*, 424 F.2d 754, 757 (C.A. 2), certiorari denied, 399 U.S. 933; *United States* v. *Robinson*, 560 F.2d 507, 517 (C.A. 2) (*en banc*), certiorari denied, February 27, 1978 (No. 77-5466). While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions should not be changed by conference in the jury room. The goal of the jury system is to secure unanimous agreement by a discussion of views, and by arguments

among the jurors themselves. *Allen* v. *United States*, 164 U.S. 492, 501. Here, the second *Allen* instruction emphasized, as did the first, that the jury's verdict should be "in conformity with your convictions and your conscience" (Tr. 444).

The trial court, moreover, rested its decision to give the supplemental charge on sound considerations. Among these was the concern with the effort and expense of going through another trial (Tr. 425), and the fact that the jury had deliberated "a very short time" (Tr. 426).[3] In sum, when considered in "context and under all the circumstances of this case, the statement was not coercive." *Jenkins* v. *United States*, 380 U.S. 445, 446.

2. Nor is this case "strikingly similar" (Pet. 10) to the facts in *United States* v. *Seawell*, 550 F.2d 1159, which led the Ninth Circuit to hold that a second *Allen*-type charge was inpermissibly coercive. In *Seawell* the jury had deliberated for two hours on a friday afternoon and then recessed for the weekend. This weekend recess allowed them at least sixty hours of reflection on the case. On the following Monday, after they had deliberated an additional one and one-half hours, the jury sent two notes to the judge, one of which read:

> [t]he jury is at a ten-to-two impasse. The two state that nothing we can say will convince

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[3] Prior to the second *Allen* instruction, the jury had deliberated approximately five and one-half hours.

> them otherwise. What course of action should we now take?

550 F.2d at 1160. After the judge responded to the second note by having testimony reread, the jury resumed deliberations and ten minutes later sent another note to the court indicating a ten-to-two deadlock. At that point, almost three days after the start of deliberations, the first modified *Allen* charge was given. About three and one-half hours later, after some intervening discussion between the judge and jury, the judge received another note from the jury which read in part:

> No amount of argument has persuaded their convictions, these are the others who do not agree with the majority of the jurors. We therefore submit to you that we are at an impasse and are not likely to change their minds until fatigue becomes a deciding factor which we believe is neither fair to the defendant or the people.

550 F.2d at 1162. The district court, after stating that the jury, in any event, would not have to deliberate beyond either 6:30 that night or the point of fatigue, then gave the second *Allen* charge. The jury retired at 4:10 p.m. and returned a guilty verdict at 5:00 p.m.

This case is wholly different on the facts. Here the jury deliberated for only two hours before it reported that it was "hopelessly deadlocked," thus prompting the trial judge to given the first *Allen* charge. There was no "weekend for reflection" as in *Seawell*, and no additional deliberation on the following court day before the first *Allen*-type

charge. The jury in this case had only one evening for reflection and an additional two and one-half hours of deliberation before they were given the second *Allen* charge, and this evening occurred on a day when several jurors probably were preoccupied with "run-off primary day" voting and scheduled appointments (Tr. 428). After a second *Allen* charge, the jury sought additional evidence and at the end of the day was still deliberating conscientiously. The trial judge therefore permissibly concluded that continuance of deliberations the following day would be fruitful and declined to declare a mistrial, which would have led to a third costly and time-consuming trial of this case (Tr. 451). There is in this *setting* no conflict with *Seawell* requiring resolution by this Court.

Petitioner contends, however, that clarification by this Court is needed concerning the proper standard of review when supplemental jury instructions are given. Specifically, he asserts the need for guidance by this Court in eliminating what he terms to be the "hodge-podge" of varying standards of review which have developed in the different circuits concerning the use of supplemental *Allen* type charges. We recognize that the courts of appeals, in the exercise of their supervisory powers, have directed that the *Allen* charge not be given except in a substantially modified form. See *United States* v. *Angiulo*, 485 F.2d 37 (C.A. 1); *United States* v. *Thomas*, 449 F.2d 1177 (C.A.D.C.); *Government of the Virgin Islands* v. *Hernandez*, 476 F.2d 791 (C.A. 3); *United States* v.

Chaney, 559 F.2d 1094 (C.A. 7). The Fifth Circuit continues to approve the *Allen* charge, *United States* v. *Bailey*, 480 F.2d 518 (*en banc*). But no court of appeals has held that the *Allen* charge in its traditional form violates any constitutional right. Moreover, all the courts of appeals have agreed that some form of supplemental instruction may appropriately be given to a jury experiencing difficulty in reaching a unanimous verdict.

In sum, the differences among the courts of appeals reflect an ongoing reexamination of the precise wording of a proper supplemental instruction and do not warrant review by this Court. Indeed, the Court has recently denied certiorari in several other cases presenting a similar issue. See *e.g.*, *United States* v. *Carter*, 566 F.2d 1265 (C.A. 5), certiorari denied, June 12, 1978, No. 77-1326. *E.g.*, *Dyba* v. *United States*, No. 76-1731, certiorari denied October 3, 1977; *Perez-Vega* v. *United States*, No. 75-5937, certiorari denied, 424 U.S. 970; *Lee* v. *United States*, No. 74-6345, certiorari denied, 422 U.S. 1044.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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